1949

Robert E. Manning v. James M. Powers : Brief of Appellant

Utah Supreme Court

Willard Hanson; Stewart M. Hanson; Attorneys for Plaintiff and Appellant;

In the
Supreme Court of the State of Utah

ROBERT E. MANNING,
Plaintiff and Appellant,

vs.

JAMES M. POWERS,
Defendant and Respondent.

Case No. 7276

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District
In and For Salt Lake County, State of Utah

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ARROW PRESS, SALT LAKE

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QUESTIONS PRESENTED

The questions presented by this appeal are briefly this:

1. Is the driver of an automobile permitted to carelessly and negligently kill an eleven year old boy and escape the consequences?

2. Will the verdict of a jury which exonerates the defendant stand where the undisputed evidence shows that he was guilty of negligence which proximately caused the death of the boy?

3. Will not this Court in this case follow the same law it has announced in innumberable cases in the past and reverse the case where the trial court by his instructions commits error prejudicial to the plaintiff?

STATEMENT OF FACTS

We will set forth the evidence with some detail that this court may correctly answer the questions presented here.

The testimony shows that the defendant left his home in Brigham City on the early morning of October 6, 1947, intending to drive to his employers place of business at Murray, Utah. He was alone and was driving a maroon colored 1946 Nash Sedan. He says he arrived at the Hot Springs in Salt Lake City about 8:40 A. M. The Springs are about two miles north from where the accident happened. We have no testimony as to the speed he drove excepting immediately preceding the accident but he must have driven at a rapid rate of speed since the accident occurred within a few minutes of 8:40. The defendant testified that he first observed the decedent, Robert Manning, the son of the plaintiff, Robert E. Manning, coming out of a lane or driveway near the center of the block between Sixth and Seventh South Streets on Second West; that the boy turned south and rode his bicycle either on the extreme westerly edge of the pavement or on the shoulder of the road (Tr. 215). His testimony as to the distance that he was from the boy at that time is variable. He testified that he was 30 or 40 feet away and also said that it might have been 60 or 70 feet away. He further

testified that he was driving in the second lane next to the center of the highway; that when Robert was almost parallel with him he turned his bicycle without any warning directly east and struck the rear of the right front fender of the automobile and was thrown from the bicycle and killed. He admitted that he gave no warning of the approach of his automobile and that he was traveling approximately 25 or 30 miles per hour. The defendant's testimony is disproven not only by the physical facts but by all the eye witneses to the accident.

The physical facts show that the rear mud guard of the bicycle was struck by the right front fender of the car near the headlight. The maroon color in the indentation near the headlight where it struck the bicycle was knocked off and the maroon color paint from that fender was in the indentation in the rear mud guard where it had been hit. Ulrich Stark, a disinterested witness saw the accident and testified that he saw Robert riding his bicycle in a southerly direction and that he was either on the extreme westerly edge of the pavement or on the shoulder next it; that he saw the automobile strike the bicycle at the rear (Tr. 178-180) and that the automobile was going at a speed of from 40 to 45 miles per hour (Tr. 190) and that no warning was given of the approach of the automobile.

Mr. LeRoy Iverson, one of the officers investigating the accident and who measured the brake marks of the automobile, estimated the speed of the automobile from 40 to 45 miles per hour (Tr. 144).

Robert Barnett, a thirteen year old schoolmate of the deceased, testified that he was standing on the east side of

the street in front of the Jensen Tire Company Store at 665 South Second West; that Robert was riding his bicycle either on the graveled part of the road or on the west part of the cement pavement; that he was carrying his lunch; that he called to Robert and said, "Well, if it isn't Manning," (Tr. 305) and that Robert took his left hand off the handlebar and waved to him; that Robert kept going south and when he reached a point at the south side of the lane between 664 and 672 on Second West (those points are all shown on Exhibit A, the map in question) the automobile driven by the defendant struck the rear of the bicycle and Robert was knocked off and fell to the pavement. (Q) And the automobile did strike the back of the bicycle, didn't it? (A) Yes, from what I could see. (Q) As far as you could see the automobile hit the bicycle right back here (indicating the dent in the rear mud guard) didn't it? (A) Yes (Tr. 307). Robert was not going very fast and I didn't hear the sounding of the horn (Tr. 308).

The other testimony does not change the foregoing facts. Boys who were in close proximity to the accident but did not see the actual striking of the bicycle by the automobile testified that they saw Robert riding his bicycle either on the west side of the paved portion of Second West or immediately on the shoulder and that as he proceeded south Bobby Barnett called to him and that Robert waved his left hand and continued riding; that there were two cars parked on the west side of the highway in close proximity to the paved portion and that as Robert approached them he turned his bicycle slightly easterly as though to pass them and then was struck by the automobile. They all

testified that no warning was given whatever of the approach of the automobile.

The body of the boy, when it finally came to rest was laying partly on the paved portion and partly on the shoulder with the bicycle close by. The lunch which the boy was carrying was scattered about along the shoulder and in close proximity to the bicycle.

After the accident an examination of the car disclosed not only the dent in the right front fender which struck the rear of the bicycle but the handle of the car was bent and the dust had been wiped off the right front door. No doubt the boy was thrown into the air by the impact and as the body came down it swung back against the door, bent the handle and wiped some of the dust off the side of the car (Tr. 230). The collision, of course, bent the frame of the bicycle as well as damaging it otherwise.

STATEMENT OF ERRORS

1. The verdict of the jury is not supported by the evidence, is contrary to the great weight of the evidence and the Court erred in denying the motion for a new trial.

2. The court erred in over-emphasizing and stressing the defense of contributory negligence.

3. The court erred in giving its instruction No. 4.

4. The court erred in refusing to give plaintiff's request No. 6.

5. The court erred in refusing to give plaintiff's request No. 4.

6. The court erred in giving its instruction No. 10.

ARGUMENT

ERROR NO. 1

THE VERDICT OF THE JURY IS NOT SUPPORTED BY THE EVIDENCE, IS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE AND THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL.

Our statement of what the evidence shows makes it clear that the over-whelming weight of the evidence is to the effect that that defendant was guilty of negligence which solely and proximately caused the death of Robert. We are firmly convinced that the defendant did not see Robert until about the time the collision occurred. However, he says he was watching the boy as he proceeded along the highway yet he never gave him any warning of the approach of the automobile. He didn't see the boy take his hand off the handlebars and wave to the Barnett boy across the street. This was seen by all the other boys. He says that when Robert was parallel with him that the boy turned his bicycle directly into the side of the automobile. This is disputed not only by the physical facts but by every other witness in the case. The deposition of the defendant was taken prior to the trial and in that deposition the defendant testified that when he first noticed the boy he was 30 feet ahead of him (Tr. 232-234). Yet at the trial he changed that to 70 feet. He testified in his deposition that he saw the front wheel hit the car and heard the impact of the body when it hit the car (Tr. 235) and that the only marks on the car were a black rubber mark on the side and a dent below the handle

and that there were no other marks on the car (Tr. 236, 237). Yet he knew at the time he was testifying at the deposition that there was a mark near the front head light and that it had been pointed out to him by the officer and that the maroon paint had been scraped therefrom and that the dent in the rear of the bicycle had maroon paint on it. The only place that paint was removed from the car was from the front of the fender near the headlight where it struck the wheel. The physical evidence clearly shows that the testimony of the defendant that the boy turned his bicycle into the side of the car is untrue. Those that saw the collision testified that the front of the car struck the rear of the bicycle. The evidence clearly shows such to be the fact. That the bicycle was struck from the rear cannot be denied. Such being the fact, the defendant, of course, was negligent and should be made to respond in damages.

The rule is almost universal that where the evidence is insufficient to sustain the verdict or where the verdict is contrary to the evidence, a new trial should be granted.

> "Where the evidence offered for the party for whom a verdict has been rendered, conceding to it the greatest probative force to which, according to the laws of evidence, it is fairly entitled, is insufficient to support or to justify the verdict, it is the duty of the court to set it aside and grant a new trial." 39 Amer. Juris. Sec. 132, Page 142.

The trial court should have unhesitatingly granted a new trial and committed error in denying the motion.

> "Where a verdict is not sustained by sufficient evidence or is based on conjecture, a new trial should

be granted." Ingram vs. Dunning, 159 Pac. 927, 60 Okl. 233.

"Where the verdict is manifestly against the weight of the evidence, it should be set aside, and a new trial granted." Young Mining Co. vs. Bank, 296 Pac. 247, 37 Arizona 521.

"New trial should be granted if evidence accredited by jury is improbable and probably untrue." Dennis vs. Stukey, 294 Pac. 276, 37 Arizona 299.

"Where a verdict contrary to strong and persuasive testimony was supported chiefly by interested and distrustful evidence, the case calls for the vigorous exercise of the trial courts prerogative to set it aside." Vidich vs. Occidental Mt. Benefits Ass'n, 196 Pac. 242, 108 Kan. 546.

See also Loth-Hoffman Clothing Co. vs. Swartz, 176 Pac. 916, 74 Okl. 18. Krann vs. Stockton Electric Company, 101 Pac. 914, 10 Cal. App. 271. Denver Tramway Company vs. Owens, 36 Pac. 848, 20 Colo. 107. Tidd vs. Railroad Co., 270 Pac. 138, 46 Idaho 652. Hennessey Oil and Gas Co. vs. Neely, 162 Pac. 214, 62 Okl. 101.

The testimony of the defendant and that of Bobby Barnett, the defendant's witness, is of no greater value to the defendant than as is shown on their cross examination. In this connection see the case of *Porter* vs. *Hunter* (60 Utah 222, 207 Pac. 153) and *Edwards* vs. *Clark* (96 Utah 121, 83 Pac. Second, Page 1021) wherein this court has held "that the testimony of a witness is no stronger than as shown by the cross-examination."

ERROR NO. 2

THE COURT ERRED IN OVER-EMPHASIZING AND STRESSING THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

The defendant in his answer alleged that Robert was guilty of contributory negligence and set forth in his answer nine separate purported acts of contributory negligence. Five of the purported acts of contributory negligence all go to one and the same proposition, to-wit, that the deceased child turned in front of the defendant's automobile. In addition to setting forth that the deceased child turned into defendant's automobile the defendant also alleged that the deceased child failed to keep a lookout, failed to have control of his bicycle so as to avoid a collision and failed to use ordinary care to avoid the collision.

The court in summarizing the pleadings in its instruction No. 1 specified each of the eight alleged grounds of contributory negligence. In instruction No. 4, the court again referred to the alleged contributory negligence upon the part of the deceased and stated that if the deceased contributed in any degree to the collision, then the plaintiff could not recover. The court further, in instruction No. 4, attempted to define contributory negligence so far as it pertains to a child. The court erred in this particular, which will be discussed hereafter. The court again in instruction No. 5 referred to the contributory negligence of the deceased, stating again that if the deceased was negligent in any of the particulars alleged in the answer, the plaintiff could not recover.

Then in instructions 6, 7, 8 and 9, the court defined the duty of a motorist driving along and upon the highway. Then, in instruction No. 10, the court qualified its instruc-

tion No. 8, and stated that the sounding of a horn in passing was a matter of discretion with the operator of the motor vehicle.

The plaintiff's theory is set forth in instructions 6, 7, 8 and 9, but qualified by instruction No. 10.

In instruction No. 11, the court again refers to the contributory negligence of the deceased and states that if the deceased were guilty of contributory negligence in any particular, the plaintiff could not recover. In instructions Nos. 12, 13, 14, 15, 16 and 17, the court repeats each of the alleged acts of contributory negligence as alleged in the answer of the defendant, and repeatedly states that if the deceased did the particular act as set forth in said instructions, Nos. 12 to 17, that the plaintiff could not recover.

The court gives four instructions on the plaintiff's theory of the case then qualifies one of them by instruction No. 10, and gives ten instructions repeatedly stating in effect that the deceased was guilty of contributory negligence and impressing upon the minds of the jurors that that was the sole issue involved in the case.

The continual repetition on the part of the court emphasizing the particular acts which the defendant alleged constituted contributory negligence on the part of the deceased was error.

In *Kent* v. *Ogden L. & I. Railway Co.*, 167 P. 666, 50 Utah 328, the court held that in charging on contributory negligence, the lower court should not undertake to name the specific things or acts which the jury may consider, but

should merely tell the jury to consider the evidence upon that subject and determine the question from a consideration of the whole evidence, and at p. 341 of the Utah Reports further held that:

> "While it is true that the plaintiff in a negligence case must recover, if at all, on one or more of the acts of negligence set forth in his complaint, yet in determining the question of contributory negligence, the jury are not limited to the acts of negligence described in the complaint but they may consider any fact, inference or circumstance disclosed by the evidence upon that subject."

The court further held:

> "It is always dangerous for a court to single out specific things or acts in charging the jury."

the last quotation particularly relating to a charge on contributory negligence.

In *Valiotis* v. *Utah Apex Mining Co.*, 184 P. 802, 52 Utah 151, the court held that it is improper for the trial court in its instructions to single out certain facts which the evidence tended to prove, and that the lower court in that case properly refused an instruction which singled out certain facts, holding that to do so invaded the province of the jury.

See also *International & G. N. R. Co.* v. *Newman*, (Texas), 40 S. W. 854, wherein the court held that an instruction singling out a particular act and stating it would not constitute proper care where the issue involved was contributory negligence, was improper. So, in the case at

bar wherein the court in five of the instructions stated that if the deceased turned his bicycle from the path in which he was riding at the time of the accident in question and into the defendant's car that the plaintiff could not recover, would be error in view of the foregoing authorities in singling out one issue and prominently placing it before the jury.

See also Blashfield's Instructions to Juries, 2nd Ed. Vol. 1, p. 343, and p. 351. In Sec. 152 of the same volume, the author states:

> "It is improper for the court to place too prominently before the jury any principle of law involved in the case as by frequent repetition. Where a number of instructions announce in varying language a single rule of law, the effect is to unduly impress a single principle announced upon the jury's minds to the exclusion perhaps of other equally important principles."

And in *Carter* v. *Missouri K. & T. Railway Co.*, (Texas) 160 S. W. 987, the court held that repeated reference to what defenses of the defendant will defeat recovery is improper and erroneous. In *Meachem* v. *Hahn,* 46 Ill. App. 149, the court held it is error to refer repeatedly to a fact or facts in evidence, as this is calculated to give undue prominence to such testimony.

See also *Gulf Railway Co.* v. *Harriett,* 80 Texas 73.

In Blashfield's Instructions to Juries, 2nd Ed. Vol. 1, Sec. 154, p. 353, the author states:

> "that a defendant has the right to demand the giving of a charge based upon a specified group of

> facts which if found to be true would constitute a good defense, but this rule cannot be held to authorize or require the giving of numerous charges upon a single fact or group of facts constituting a single defense, merely because such charges are deftly phrased, and the practice of singling out one among several important issues and submitting it to the jury is improper."

In Randall's Instructions to Juries, Vol. 1, Sec. 431, p. 774, the author states:

> "It is improper to single out a particular issue or defense so as to impress the jury with the idea that it is the controlling one—or to emphasize the theory of one party as compared with the theory of his adversary."

The lower court in the case at bar in giving ten instructions on the contributory negligence of the deceased over-emphasized the defendant's theory and without question influenced the jury in favor of the defendant.

In Randall's Instructions to Juries, Vol. 1, Sec. 432, p. 785, the author states that instructions singling out certain facts bearing on an issue and telling the jury that they may or should consider such facts in determining such issue, although the jury are also told they should consider such facts along with all the other evidence, are erroneous or properly refused.

See also *Condie* v. *Rio Grande,* 34 U. 237, 97 P. 120, wherein the court held that it would be error to single out an isolated fact in a charge to the jury and that refusal to give such a charge was proper.

Reid's Branson Instruction to Juries, 3rd Ed., Vol. 1, Sec. 105, pp. 290 and 291, states the law to the same purport and cites many cases to the effect that an instruction which lays especial stress upon certain features of the case in such a way as to take the jury's attention from other phases upon which there might be a recovery should not be given, even though they assert a correct principle of law, and further that objectionable prominence occurs where the court unnecessarily stresses the question of contributory negligence.

See *Freire* v. *Kaupman,* 281 N. Y. S. 408.

See also *Wiser* v. *Copeland,* (Ariz.), 203 P. 565, wherein the court held an instruction which laid undue stress on one fact to the exclusion of all others proper to be considered in determining the issue of negligence erroneous, and the court laid particular stress and emphasis upon the defendant's rights without relation to the rights of the plaintiff. The court in that case, which was a negligence case, involving the use of the highway, instructed the jury that the defendant had the right to use the right-hand side of the highway, or any portion thereof, and failed to state to the jury the duties the defendant owed to the plaintiff in his use of the right portion of said highway, and over-emphasized the defendant's rights without relation to the plaintiff's rights; this the court said was error.

It is obvious from the foregoing authorities that the court in instructing the jury in the case at bar, not only over-emphasized the matter of contributory negligence, but failed, in instructing the jury on the question of contributory negligence, to inform them of the plaintiff's rights in this connection.

ERROR NO. 3

THE COURT ERRED IN GIVING INSTRUCTION NO. 4,

AND

ERROR NO. 4

THE COURT ERRED IN FAILING TO GIVE PLAINTIFF'S REQUEST NO. 6

Both Errors Nos. 3 and 4 may be considered together, both going to the proper manner of instructing the jury as to the contributory negligence of a minor.

The court in its instruction No. 4 gave the following instruction:

> "You are instructed that if you find by a preponderance of the evidence that the deceased child, Robert Manning, was contributorily negligent in one or more of the particulars alleged by the defendant, and that such negligence, if any, on his part proximately caused and contributed in any degree to the collision and his death, then the plaintiff cannot recover in this case, regardless of the negligence, if any, of the defendant, and each of the following instructions regarding the right, if any, of the plaintiff to recover is subject to this qualification.
>
> "You are instructed in this connection that said Robert Manning was under a duty to exercise that degree of care for his own safety which would ordinarily be used by an ordinarily prudent boy of the same age, capacity, and experience.
>
> "The age, capacity and experience of the said Robert Manning are factors which you may take into consideration together with all of the evidence in the case in determining whether or not the defendant was negligent, so far as such factors were

known to or in the exercise of ordinary care could have been seen by the defendant, or the said Robert Manning was contributorily negligent in accordance with these instructions.

"Each of the participants in the collision are presumed to have acted as reasonably prudent persons until proof is made."

In the above instruction the court stated that if the deceased was guilty of contributory negligence he could not recover. Then, in paragraph 2 of the instruction the court attempted to qualify its previous statement as to contributory negligence by stating that the deceased was under a duty to exercise that degree of care for his own safety which would ordinarily be used by an ordinarily prudent boy of the same age, capacity and experience. This qualification is to some extent true. But in paragraph 3 of the instruction, the court goes on to say that the age, capacity and experience of the deceased were factors which the jury might consider in determining the defendant's negligence, so far as such factors were known to the defendant. This, of course, was a gross error on the part of the court and was not a correct statement of the law as has been laid down by this Honorable Court. The age, capacity and experience of the child are matters which the jury are to take into consideration in determining whether or not the child was guilty of contributory negligence. It is not how the age, capacity and experience appear to the defendant.

In *Gesas* v. *Oregon Short Line*, 93 P. 274, 33 Utah 156, the court at p. 174, lays down the rule that a child is not negligent or contributorily negligent if he exercises that

degree of care which, under like circumstances would be expected of one of his years and capacity.

In *Herald* v. *Smith,* 190 P. 932, 56 Utah 304, the court held at p. 308 of the Utah Reports that:

> "The degree of care required of a child must be graduated to its age, capacity and experience, and must be measured by what might ordinarily be expected from a child of like age, capacity and experience under similar conditions. If it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence."

The court in so holding quoted the above referred to Gesas case and also the case of *Groesbeck* v. *Lake Side Printing Co.,* 186 P. 103, 55 Utah 335.

It is for the jury to determine whether the child in question did what might ordinarily be expected from a child of like age, capacity and experience under similar conditions. It is not how the age, capacity and experience appeared or were known to the defendant. In the court's instruction No. 4, the court states that the jury may consider the age, capacity and experience, and then qualifies that statement in paragraph 3 by stating that it is for the jury to consider these factors so far as they appeared to the defendant. Such is not a correct statement of the law. The court is confusing the factors the jury should consider in determining the contributory negligence of a child with the degree of care which the defendant owes to the child when the defendant knows a child is involved.

The plaintiff in his requests for instructions requested the court to give the following instruction, going to the contributory negligence of the deceased child:

> "You are instructed that the defendant contends that the deceased was guilty of contributory negligence and in the particulars set forth in the defendant's answer, and that such acts upon the part of the deceased were the sole cause or contributed to any accident to him and his death; in such respect the court charges you that in the absence of evidence to the contrary, it is presumed that the deceased exercised due care for his own safety. The general rule as to an adult, if it be shown that he was guilty of negligence which directly and proximately contributed to an accident and injury sustained by him bars recovery for damages by him for any injury resulting from the fault or negligence of another, or in case of his death, recovery by his beneficiary. But, the same conduct and degree of care required of an adult to be exercised by him for his own safety does not in full force apply to a child of 11 years of age. Such a child or person is required to exercise only that degree of care and caution which persons of like age, capacity, experience and intelligence might be reasonably expected to naturally and ordinarily use under the same situation and like circumstances; thus, in determining whether the deceased was negligent, as in the answer of the defendant alleged, you are entitled to and should take into consideration the age of the deceased, his experience and intelligence, and his knowledge and appreciation of danger incident to riding his bicycle along the street in question, and if upon all the evidence in the case, you find that the deceased exercised such care and caution as naturally would be expected from a boy of like age, experience and intelligence under similar

circumstances and conditions, then you will find that the deceased was not guilty of contributory negligence."

The above request is a correct statement of the law as is set forth in the above quoted decisions from this Honorable Court.

ERROR NO. 5

THE COURT ERRED IN REFUSING TO GIVE PLAINTIFF'S REQUEST NO. 4

The plaintiff requested the court to give the following request:

"You are instructed that it is undisputed that the defendant Powers in driving along and upon the highway at the time and place in question observed the deceased, Robert Manning, proceeding along and upon the highway in front of him upon his bicycle, that he intended to pass him and that he knew at said time that the deceased was a young boy. You are instructed that the degree of care to be exercised by the driver of an automobile is greater when the safety of a child or children is concerned, and when such facts are known to the operator of the automobile; and it is for you to determine whether or not Mr. Powers exercised that degree of care and caution at the time and place in question as would be exercised by an ordinary prudent person under the same circumstances, and if you find from a preponderance of the evidence that in passing the deceased, the defendant failed to exercise that degree of care and caution as an ordinary prudent person would exercise in passing a young boy on a bicycle, and the failure to exercise that degree of care was the sole, proximate cause of the accident in question, then your verdict would be in favor of the plaintiff and against the defendant."

Nowhere in the court's instructions did the court define the duty of the defendant when the presence of children was involved. The above request made by the plaintiff defines the duty of an automobilist driving along and upon a highway when the presence and safety of children are concerned. The court in its instruction No. 4 (supra) (referred to in the discussion of Errors 3 and 4), in attempting to define what factors should be considered in determining whether or not a child was contributorily negligent confused those factors with the duty of a motorist when the presence of children was concerned. The defendant in the case at bar admitted on cross-examination that he saw and knew the deceased was a young boy and that he was riding a bicycle. Knowing these facts, it was incumbent upon the defendant to exercise a higher or greater degree of care along and upon the highway in question and in attempting to pass the deceased.

This Honorable Court has held in many cases that children are prone to be less mindful of danger than are persons of mature years, and for that reason a greater degree of care is required of a person who drives an automobile in close proximity to children than is required in driving in close proximity to mature persons.

In the case of *Herald* v. *Smith,* 190 P. 932, 56 U. 304, the court says at p. 309 of the Utah Reports, that the operator of an automobile is only required to exercise ordinary care or such care as an ordinarily prudent person would exercise under like or similar circumstances, and as indicated,

> "The degree of care required to be exercised will be greater when the safety of children or others of immature judgment is involved and such facts are known to the operator of the car."

The court in its instruction No. 4 (supra) confused the above statement of law with the definition of contributory negligence involving a child.

This court followed the above rule in the cases of *Green* v. *Higbee*, 244 P. 906, 66 U. 539, and in *Woodward* v. *Spring Canyon Coal Co.*, 63 P. (2d) 267, 90 U. 578.

In the *Woodward* case at p. 271 (Pacific Reporter) this court says:

> "It is a matter of common knowledge that children are prone to be less mindful of danger than are persons of mature years. For that reason, a greater degree of care is required of a person who drives an automobile in close proximity to children than is required in driving in close proximity to mature persons."

The court should have separately and as requested by the plaintiff in his request No. 6 (supra) stated to the jury the matters and things they should consider in determining contributory negligence on the part of a child, and then should have instructed the jury as to the duty of the defendant at all times towards the child when the defendant knew that the deceased, which it is undisputed in this case that he knew, was a child. In other words, the court in instruction No. 4 told the jury that they could consider the age, capacity and experience of the deceased child in determining contributory negligence but qualified the state-

ment by stating "so far as those things appeared to the defendant." As stated before, nowhere in the court's instructions does the court instruct the jury that a higher degree is owing to a child than to a mature person, and this should certainly have been given to the jury when it was admitted by the defendant that he knew the deceased was a child.

We respectfully call this Honorable Court's attention to the court's instructions Nos. 11 to and including 17. The examination of those instructions will reveal that the duty placed upon the deceased child is the duty required of an adult person, and although the instructions might be correct statements of the law so far as they pertain to adult persons, they are not a correct statement of the law so far as they pertain to the case at bar. If the court insisted upon repeating contributory negligence in each of the above referred to instructions, as it did, then the court should have modified each of them by stating that they could only consider the deceased contributorily negligent after they had taken into account his age, intelligence and experience.

ERROR NO. 6

THE COURT ERRED IN GIVING INSTRUCTION NO. 10

The court correctly stated the law in its instruction No. 8, wherein the court instructed the jury that a person driving an automobile coming from the rear shall by audible signal indicate his intention to pass a vehicle proceeding in front of him, and that failure to give an audible signal of intention to pass constitutes negligence. Then, in instruction No. 10, the court instructed as follows:

> "You are instructed that the law of this state pertaining to the requirement of sounding a horn on a motor vehicle does not require the use of a horn in passing, if the driver of a vehicle intends to pass another vehicle under any and all circumstances. Therefore the question of sounding the horn is a matter which is left to the sound judgment of the operator of the motor vehicle in the exercise of ordinary care, and the failure to sound a horn immediately prior to the happening of an accident does not consistute negligence as a matter of law."

The above quoted instruction is not only contrary to law, but is in direct conflict with instruction No. 8. Instruction No. 10 (supra) leaves the matter of sounding the horn to the sound judgment of the operator of the motor vehicle. This of course is absolutely contrary to the laws of Utah. Section 57-7-122, subdivision (b) U. C. A., 1943, provides as follows:

> "Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle."

Section 57-7-206, subdivision (a) U. C. A., 1943, provides as follows:

> "Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn or other warning device shall emit an unreasonably loud or harsh sound or a whistle. The driver of a motor vehicle shall when

reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway.

The first section of the Code referred to provides that overtaken vehicles shall give the right of way on audible signal. The statute does not leave the matter to the sound discretion of the person overtaking, but makes it mandatory upon him to give an audible signal before passing. The second section of the statute above referred to makes it mandatory upon the operator of an automobile to sound his horn when reansonably necessary to insure safe operation, and certainly where children are involved a horn is always required to be sounded in passing them in order to warn of the approach of the on coming vehicle and to insure them the safety they are entitled to.

It is for the jury to decide whether it was necessary to give a warning at the time and place of the accident in question and not a matter to be left to the sound judgment of the defendant.

Instruction No. 10 (supra) not only invades the province of the jury but is in direct conflict with both of the above referred to statutes. It is not for the driver of the automobile to determine whether it is reasonably necessary to sound a horn, but it is for the jury to determine upon all the facts and circumstances in the case whether or not the person who is being overtaken is a person of mature years or is a child, and as stated before where a child is involved a higher degree of care is required and that degree of care is only exercised when a horn is sounded while passing a child.

We respectfully submit that the court erred in its instructions given; in its refusing to instruct as requested by plaintiff, and in overruling and denying plaintiff's motion for a new trial, and that the judgment of the jury and court should be reversed and a new trial granted.

Respectfully submitted,

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